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No. 864

In the

Supreme Court of the United States

OCTOBER TERM, 1968.

CITY OF HIGHLAND PARK, a municipal corporation of Lake County, Illinois,

Petitioner,

vs.

VITO FIORE and DELLA FIORE, his wife,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT FOR THE SECOND DISTRICT

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The Scheffer Press, Inc.—ANdover 3-6850

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To the Honorable The Supreme Court of the United States:

Petitioner asks that a Writ of Certiorari issue to review the Judgment of the Appellate Court of Illinois, 2nd District, which affirmed the judgment of the Circuit Court of the Nineteenth Judicial Circuit of Illinois, that petitioner was foreclosed from exercising its legislative authority in planning and zoning the use of land within its boundaries.

OPINIONS BELOW

The Opinion of the Appellate Court of Illinois (Appendix G) is reported at 93 Ill App 2d 24, 235 NE 2d 23; the Judgment of the Circuit Court of Illinois, Nineteenth Judicial Circuit (Appendix F) is unreported.

JURISDICTION

The Opinion of the Appellate Court of Illinois, Second District, was filed March 6, 1968; the Petition for Rehearing was denied April 4, 1968; the Petition for Appeal as a Matter of Right, Or, In the Alternative, Petition for Leave to Appeal, was denied by the Supreme Court of Illinois on September 23, 1968. The jurisdiction of this Court is invoked under U.S.C.A. Title 28, Section 1257(3).

QUESTION PRESENTED

May a State Court constitutionally

(1) enjoin or deprive a municipal legislative body from exercising its lawful and exclusive power to enact zoning ordinances affecting properties within its boundaries, and

(2) itself legislate by decree a specific use of a property contrary to the legislative judgment of the municipality.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U. S. Constitution, Amend. XIV, Sec. 1:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Constitution of Illinois, 1870, Art. III.

> "The powers of government of this state are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, . . .".

3. Illinois Revised Statutes, 1965, Ch. 24, Article 11, Division B.

> ". . . the corporate authorities in each municipality have the following powers: . . . (3) to regulate and limit the intensity of use of lot areas, and to regulate and determine the area of open spaces, within and surrounding such buildings; (4) to classify, regulate and restrict . . . the location of buildings designed for specified industrial, business, residential, and other uses; (5) to divide the municipality into districts . . . of such different classes (according to use of land and buildings, . . . intensity of the use of lot area, area of open spaces, or other classification) as may be deemed best suited to carry out the purposes of this Division 13; . . ."

STATEMENT OF FACTS

Plaintiffs own a parcel of land in Highland Park, Illinois, containing approximately 20 acres. Abutting properties on three sides of plaintiffs' parcel are zoned for single family residential use. The abutting property on the north is a golf course, on the east a park district and on the south a residential subdivision developed on ½ acre lots with houses valued at $45,000 to $90,000. The parcel has a frontage of approximately 750 feet on a four lane highway and a depth varying from approximately 887 feet to 1245 feet.

From 1922, when Highland Park adopted its first zoning ordinance to September 1964, plaintiffs' parcel has continuously had the same single family residential classification as the abutting properties on the north, east and south.

In November 1963, Mr. Anthony Antoniou, president of a corporation which was engaged in the business of buying land and developing shopping centers and apartment complexes in Florida, Indiana, Iowa, Wisconsin and Illinois, entered into a contract to purchase the entire 20 acre parcel conditioned upon obtaining a zoning change to permit the use of approximately ten acres of the parcel for multiple family dwellings. Thereupon, an application was made to the City Council of the City of Highland Park to rezone the front six acres abutting the highway for office and research use, the ten acres for multiple family use, leaving the remaining four acres at the rear in its then zoning classification, ½ acre single family residential. (See sketch, Appendix "A"). The ten acre parcel is 350 feet back off the highway. The Highland Park Plan Commission, after several public hearings, recommended to the City Council that 16 acres of

plaintiffs' property, consisting of the 10 acre parcel involved in this proceeding and the front 6 acre parcel, together with three parcels fronting on the highway owned by others, be rezoned for office and research use and in September 1964 the City Council passed an ordinance rezoning the properties as recommended by the Plan Commission.

Plaintiffs filed a declaratory judgment action in the Circuit Court to have the office and research zoning classification of only the ten acre parcel declared void and prayed that they be allowed to develop the ten acre parcel for multiple family use. The Circuit Court, on May 20, 1965 decreed (1) that the office and research classification of the ten acre parcel was void; (2) that the prior single family residential classification was also void, and (3) ordered the City to permit multiple family use of the ten acre parcel without limitation. (See Memorandum Opinion, Appendix "B", and Decree, Appendix "B-1"). The Appellate Court of Illinois, 2nd District, upon appeal, sustained that portion of the trial court decree finding the office and research classification void; reversed the portion of the decree finding the prior single family classification void and also that portion of the decree granting unlimited multiple family use and remanded the cause to the trial court with instructions to limit its decree to a specific multiple family use and to hear further evidence in that regard, if necessary. The Appellate Court in its decision, stated that "The effect of the (Circuit Court) decree was to leave the property 'unzoned'." (*Fiore* v. *City of Highland Park,* 76 Ill. App. 2d 62, 221 NE 2d 323, 1966). (See Appendix "C", p. 22a).

Following this decision of the Appellate Court, the City Council of the City of Highland Park, in April 1967, acting upon the recommendation of its Plan Commission

(see Appendix "D") adopted an ordinance rezoning the then "unzoned" ten acre parcel to the ½ acre single family zoning classification that had existed prior to plaintiffs' request for rezoning. (See Appendix "E").

Upon the remand of the case to the Circuit Court additional testimony was taken, including the April 1967 ordinance. (Appendix "E"). The reasonableness of the April 1967 ordinance rezoning the ten acre parcel to single family use was not controverted nor put in issue by the plaintiffs. In May 1967 the Circuit Court entered a supplemental decree finding that the legislative body of the City of Highland Park "had *no authority to rezone*" the ten acre parcel and declared the April 1967 ordinance "void and of no effect" (See Appendix "F"). The Appellate Court affirmed the Supplemental Decree (Appendix "G"), denied rehearing (Appendix "H") and the Supreme Court of Illinois denied leave to appeal (Appendix "I").

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Your petitioner has been denied due process and the equal protection of the laws in a case which requires the grant of this Court's Writ of Certiorari to correct a discriminatory decision in a zoning case having implications national in scope and destructive in effect upon the orderly, rational development of planning and zoning by every municipality in the United States.

The decision from which your petitioner seeks relief contravenes well-settled principles of general and Illinois zoning law, while relying on a doctrine of convenience which violates the principle of separation of powers and denies municipalities of both due process and equal protection of the laws.

The trial court in its first decree in 1965 declared the original single family zoning classification of plaintiffs' property void. The Appellate Court reversed the trial court on this point stating that the validity of the single family zoning classification was not in issue in this case. It went on to state that "The effect of the decree was to leave the property unzoned". Thereafter, the City rezoned the property to its original single family classification. The trial court in its supplemental decree in May 1967 held (and the Appellate Court affirmed) that the rezoning ordinance was invalid for lack of authority. There has been no valid judicial determination of the reasonableness of the single family classification. The cumulative effect of these decisions, coupled with the courts' own determination of what the zoning should be, has been to deprive the City of Highland Park of due process of the law on a matter vital to the welfare of the entire community.

Municipalities in Illinois, as elsewhere, have been delegated by statute the legislative authority to plan and zone

the use of land within their boundaries. (Illinois Rev. Stat. 1965, Ch 24, Sections 11-13-1 et seq.) Case law in Illinois, as elsewhere, overwhelmingly stands for the proposition that a zoning ordinance is entitled to a presumption of validity, and that the burden is on the property owner to show the invalidity thereof. See, for example, *Elmer Clavey* v. *City of Highland Park,* 75 Ill App 2d 464, 220 NE 2d 93 (1966) upholding single family zoning of property only one-half mile south of the property in question, and decided by the same court whose judgment is here in question. The same rule applies elsewhere. *McLarty* v. *Borough of Ramsey,* 270 F 2d 232 (3d Cir, 1959).

No such presumption was afforded petitioner here, notwithstanding the uncontradicted evidence in favor of the single family classification of the property here in question.

In addition to the proscription of the Illinois Constitution Art. III, Illinois case law has uniformly followed the rule set out in, inter alia, *Fletcher* v. *City of Paris,* 377 Ill 89, 35 NE 2d 329 (1941) at p. 96:

> "The judiciary has no supervision over the legislative branch of the government. The courts can neither dictate nor enjoin the passage of legislation."

Even the Appellate Court of Illinois, Second District, in a case involving petitioner's adjoining City of Highwood, in which an original zoning ordinance was adopted after trial commenced, said, in *Kaufman* v. *City of Highwood,* 91 App 2d 196, 233 NE 2d 230 (1968) at p. 231:

> "More correctly, the right of a municipality to pass ordinances relating to zoning classifications, as was done in the instant case, follows the rule as set forth in the case of Bohan v. Village of Riverside, 9 Ill. 2d 561, at page 566, 138 NE 2d 487, at page 490 (1956); where the court said:

> 'The mere pendency of a suit by plaintiffs does not affect the power of a municipality to pass an ordinance or the manner of exercise of such power as prescribed by statute' " .
>
> "Moreover, it certainly does not appear that the plaintiffs in the instant case acquired property in question in reliance on any existing ordinance or zoning classification different from the ordinance ultimately adopted by the municipality."

The decision from which relief is sought in the instant case holds that your petitioner was without the authority to exercise its legislative power, notwithstanding the statement of the Appellate Court in its first decision in this case (Appendix "C") that:

> "The effect of the decree was to leave the property unzoned".

and notwithstanding that only thereafter did the City adopt a second amendatory ordinance rezoning the property to its original single-family dwelling district classification.

The opinion of the Court in the case at bar relies upon the decision in *Sinclair Pipe Line* v. *Village of Richton Park,* 19 Ill 2d 370, 167 NE 2d 406 (1960). The import of the decision in *Sinclair* is found at p. 379:

> "In our opinion, it is appropriate for the court to avoid these difficulties by framing its decree with reference to the record before it, and particularly with reference to the evidence offered at the trial. In most of the cases that have come before us in recent years, a specific use was contemplated and the record was shaped in terms of that use. In such cases the relief awarded may guarantee that the owner will be allowed to proceed with that use without further litigation and that he will not proceed with a different use. If the

land owner asserts a broader challenge in terms of a class of uses, the decree may be shaped accordingly. Such decrees will not, of course, solve all potential problems for all times, but neither will a decree the effect of which is to leave the property completely unzoned. In either case further action by the appropriate legislative body is indicated".

Notwithstanding the desirability of avoiding further litigation, the invasion of the legislative domain by the judiciary, without the safeguards for the public weal required in the legislative exercise of the zoning power, denies to municipalities and their citizens due process and equal protection of the laws and seriously impairs the responsibility for planning and zoning vested in municipalities throughout the nation.

Unlike the case at bar, involving an amendatory ordinance, the *Sinclair* case involved an original zoning ordinance. The Illinois Supreme Court recognized the distinction in *Treadway* v. *City of Rockford,* 24 Ill 2d 488, 182 NE 2d 219 (1962) at p. 492:

> "The situation upon which our decision in *Sinclair Pipe Line* v. *Village of Richton Park,* 19 Ill. 2d 370, was predicated does not exist in the instant case, nor are the difficulties inherent in that situation present. *The ordinance here under attack is an amendment rezoning the* property from a residential to a local business classification. If the court finds the amendment valid, the property is zoned in accordance with the amendment. *If the court holds the amendment invalid, the property is still subject to the original zoning classification.* In neither event can the effect of a decision in this case be to leave the property unzoned. The reason justifying the type of decree involved in the *Sinclair Pipe Line Co.* case are absent in this case, and the trial judge was without authority to impose

restrictions in addition to those imposed by the municipality".

See also *Copeland* v. *City of St. Joseph,* 126 Mo 417, 29 SW 281 (1895); *City of Portland* v. *Schmidt,* 13 Ore. 17, 6 Pac 221 (1885); 50 Am. Jur. Sec. 521-523; 102 ALR 802, Annotation, "Unconstitutionality of Later Statute as Affecting Provision Purporting Specifically to Repeal Earlier Statute".

The decision below evades these authorities.

Moreover, the application of the *Sinclair* doctrine of convenience in the base at bar illustrates the dangers inherent in it. Without paying any attention to the uncontradicted and uncontroverted evidence of the suitability of the property for the single family use for which it was zoned, and without deciding the reasonableness of that classification, the judgment below frames its decrees *in terms of the use proposed by the owner,* and affirms the trial court's substitution of its own judgment for that of the legislative body as reflected in its Memorandum Opinion (Appendix "B") when the trial court said:

> "In a community the size of Highland Park, the Court feels it is not good planning, nor is it possible to restrict and confine all multiple housing (apartments) to the downtown area and railroad track neighborhood of the community without depriving many citizens of valuable rights."
>
> "It would seem that good planning would call for the establishment of a multiple dwelling area someplace or places in the outlying areas of the community, and the subject property seems a logical location for the same, buffered as it is by the large areas of the golf course and Park District properties."

Continuing in conscious disregard of the ruling in *Elmer Clavey, Inc.* v. *City of Highland Park,* upholding single family residential zoning of property, within ½ mile south of the property in question, fronting on the same highway, and also facing non-residential zoning uses across that highway, the Trial Court held:

> "Certainly it is not good planning and good zoning, and must necessarily have a deleterious effect on property when one side of an arterial highway is completely zoned industrial and business, and the other side residence. See *Northern Trust Company* v. *Chicago,* 4 Ill. 2d 432 at Page 438."

There is yet one more reason why the decision below should be reviewed—it is not fair. It is not fair to other municipalities on whom its rationale may be imposed through *stare decisis,* and it is not fair to your petitioner because it interferes with orderly, rational development of a pattern of land use and revitalization affecting the welfare of an entire community. It is not fair to those adjoining land owners whose property has been developed and is being used in conformity with that plan which it destroys. It is not fair because it sacrifices legal principle for private convenience. It is not fair because it sacrifices the public good for private gain.

CONCLUSION

The cumulative effect of the invasion of the legislative domain by the judiciary in violation of the express prohibition of the Illinois Constitution, coupled with the deprivation by the Court below of the authority of the Petitioner to exercise its lawful legislative function in an area so closely linked to the welfare of the entire community, constitutes a denial of due process of law and of the equal protection of the laws, the extent of which is evidenced by the totality of the errors committed below.

For the foregoing reasons, your petitioner respectfully submits that this petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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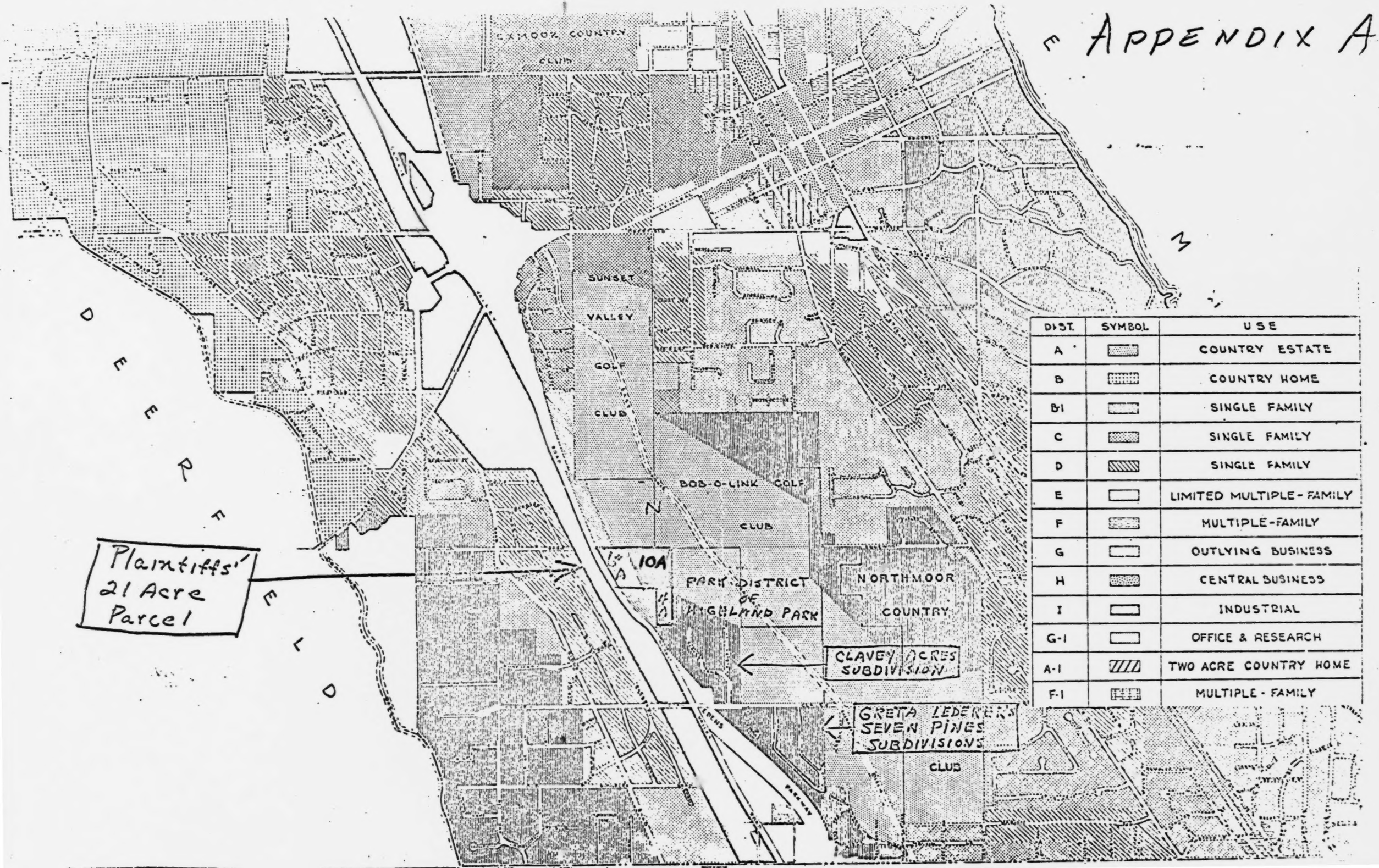
APPENDIX A

Sketch of Area



DIST.	SYMBOL	USE
A		COUNTRY ESTATE
B		COUNTRY HOME
B1		SINGLE FAMILY
C		SINGLE FAMILY
D		SINGLE FAMILY
E		LIMITED MULTIPLE-FAMILY
F		MULTIPLE-FAMILY
G		OUTLYING BUSINESS
H		CENTRAL BUSINESS
I		INDUSTRIAL
G-1		OFFICE & RESEARCH
A-1		TWO ACRE COUNTRY HOME
F-1		MULTIPLE-FAMILY

APPENDIX B

Memorandum Opinion

This cause comes on for hearing upon the complaint and an amendment to the complaint. Essentially the complaint consists of one count reciting that plaintiffs' property (except approximately the west fifty (50) feet of Parcel 1) is zoned District "A", Country Estate, and that said westerly fifty (50) feet is zoned B-1, another primarily residential classification requiring a minimum lot size of 20,000 square feet. Further, it recites that plaintiffs filed a petition with defendant seeking a rezoning to "O & R" of a portion of Parcel I and a rezoning of the balance of Parcel I and all of Parcel II to "F" multiple family zoning. The "axe-handle" was not included in the legal description in this proceeding. The rezoning was denied.

The amendment to the complaint consists of a second count, setting forth in substance, that since the filing of the original complaint herein, the entire property has been rezoned by the City of Highland Park to G-1, "Office, Research, and Compatible Use." It requests "O & R" on part of Parcel I and the entire balance as "F".

Answers were filed to both counts, which for practical purposes constitute a denial of the essential elements of plaintiffs' complaint as amended, and set forth in an affirmative defense to both counts, alleging that plaintiffs have not exhausted their administrative remedies.

Through some typographical error early in the proceedings the "axe handle" area of the property in question (see Plaintiffs' Ex. No. 3) was omitted from the description of the real estate in this suit. It was also omitted from the description in the amendment to the zoning ordinance which rezoned the property G-1, "Office, Research and Compatible Use." The entire tract, if the

"axe handle" were to be included, consists of approximately twenty-one (21) acres. But inasmuch as it is not included in these proceedings, and still remains "A" or partly "A" and "B" or "B-1", the area of the property with which we are dealing in this suit is approximately sixteen (16) acres.

The case was tried on the theory that the Highland Park Ordinance in question, namely the original residence zoning of the property and the ordinance belatedly rezoning it "Office, Research and Compatible Use" were arbitrary and unreasonable as applied to Plaintiffs' property, and that they bore no substantial relation to the public health, safety or welfare. The Court's decision is based upon its finding that the ordinance zoning the property "A & B-1", and the amendment rezoning all of the property (except the axe handle) "Office, Research and Compatible Use", are both arbitrary, unreasonable and confiscatory as applied to Plaintiff's property and bear no reasonable or material relation to the public safety, health or welfare.

The subject property is bounded on the west by Skokie Highway, which is a very busy four-lane arterial highway; on the south by a small tract of "O & R" and the "axe handle" which abuts Clavey Acres (residential); on the east by the Park District property, and on the north by the Bob-O-Link Golf Club, (a narrow strip along the highway having been zoned "O & R" at the same time as Plaintiffs' property). Outside of Clavey Acres there is no developed residential property in the immediate area.

It is not entirely clear from the evidence what proportion of the property, including the "axe handle," was zoned "A" and what proportion "B-1" at the time of the filing of the original complaint, nor is it clear after the amending "O & R" Ordinance how much of the "axe handle" remains "A" and how much "B-1". In a substantive sense, these details are not important nor, in the opinion of the Court, determinative of the basic questions involved.

The evidence on both sides was voluminous—more so on the Defendant's side than on the Plaintiffs'. Much of the Defendant's evidence, both in regard to planning in Highland Park and as to the valuation of the property in question, was very general, theoretical and sometimes unrealistic. In the Court's opinion much of it failed to bear precisely upon the particular property in question and was not convincing to the Court. It seems obvious that the rezoning of this property as "Office, Research and Compatible Use" after the filing of suit was a hastily conceived attempt to change the character of an area which could not be justified as "single family." In the Court's opinion it does not solve the problem because that use under the ordinance and the size of the area rezoned is unrealistic. It is clear to the Court that "O & R" development outside of Chicago has tended to go west and northwest, more than it has directly north. The development north along Skokie Highway is still far from complete, and the Court thinks it is clear from the evidence that because of the distance from Chicago, and other factors, it will be many years before there is any substantial development of "O & R" property in Highland Park. One of the witnesses testified that only 18 to 20 percent of the properties zoned to permit "O & R" uses between Dempster Street, Evanston and Lake Forest had been developed up to this date. It is clear from the evidence (see Plaintiffs' Exs. Nos. 17, 18 & 19) that when the restrictions applicable to "O & R" classification adjoining residence property are applied to the subject property, it becomes completely unusable in any practical sense.

It is abundantly clear from the evidence in this case that there have been no sales recently of property for "Office, Research and Compatible Use" in the areas provided therefor. The Court refers to the Encyclopedia-Britannica property; the Singer property farther north; and to the Glassman property. And, in the Court's opinion, there is no likelihood that there will be any in the foreseeable future. The evidence shows that rather extensive

efforts to interest prospective buyers in Plaintiffs' property for "O & R" uses have been completely unavailing, and the Court finds that there is no credible evidence that this situation is likely to change in the foreseeable future.

It further seems clear from the evidence that the property in question, because of Skokie Highway, does not lend itself to reasonable development under "A" or "B-1". This, despite the testimony of Defendant's experts, which the Court feels, in a great degree, ignored the physical facts immediately surrounding the subject property.

Highland Park is a substantial community of approximately thirty thousand people, and despite the constant reiteration of the phrase "careful planning" throughout the evidence in this case, has certain glaring examples of bad planning, such as the establishment of a very long, and in many ways, impractical industrial district (as narrow as one hundred feet at one point) running the entire length of the community along the west side of Skokie Highway. This artificial and haypenstance creation can probably not continue indefinitely. However, its presence certainly has its effect on the subject property.

In a community the size of Highland Park, the Court feels it is not good planning, nor is it possible to restrict and confine all multiple housing (apartments) to the downtown area and railroad track neighborhood of the community without depriving many citizens of valuable property rights.

It would seem that good planning would call for the establishment of a multiple dwelling area someplace or places in the outlying areas of the community, and the subject property seems a logical location for the same, buffered as it is by the large areas of the golf course and Park District properties.

Certainly it is not good planning and good zoning, and must necessarily have a deleterious effect on property when one side of an arterial highway is completely zoned

industrial and business, and the other side residence. Several cases to this effect can be found in the Illinois Reports. See Northern Trust Company vs. Chicago, 4 Ill. 2d 432 at Page 438.

The attraction of the area in question for high priced single family residences is, in the opinion of the Court, bound to diminish in the future. In the Court's opinion, it is clear that there will be no substantial devaluation of the properties in Seven Pines Subdivision or in Clavey Acres, which was not in reasonable anticipation at the time these homes were located where they were. It is further the Court's opinion that the granting of the zoning requested by Plaintiffs would in no manner affect any of the properties in Seven Pines, and that its effect on the properties in Clavey Acres Subdivision would be negligible.

It is obvious from the evidence that to deny the zoning requested by Plaintiffs would, in effect, deny the Plaintiffs the use of their property, and would be arbitrary and unreasonable, and that such denial would bear no substantial relation to the public health, safety or welfare. The Plaintiffs have a contract for the purchase of their property for the sum of $250,000, and despite the volume of evidence presented in this cause, the Court is of the opinion that the property cannot be economically developed under the recent "O & R" classificaton or its former residential classification. The hardship of zoning upon an owner is not confined solely to differences in value because of restrictive classifications, but frequently may be caused by inability to economically develop by reason of restrictions.

The Court further feels that the Plaintiffs have pursued their administrative remedies as far as they were required to. Where you have a substantial zoning change requested, such as in the instant case, it is not a requirement that the person seeking the change pursue his remedy for a variation before filing a suit for declaratory judgment. The basic question is whether the efforts by the Plaintiffs

are reasonable, and that it is reasonably certain that the rezoning would not be allowed. This seems clear to the Court from the actual denial of the request, the report of the Planning Commission and Industrial Commission of the City of Highland Park.

The Court, therefore, finds: First, that the zoning of the entire subject property under the ordinance in question, and more particularly, the last amendment thereof as "Office, Research and Compatible Use" is arbitrary, unreasonable and confiscatory, and unconstitutional as applied to Plaintiffs' property.

Second, the zoning of the Plaintiffs' property as either "A" or "B-1" for single family residences, is likewise unreasonable, arbitrary, unconstitutional and confiscatory as applied to Plaintiffs' property.

Third, that the restrictions imposed, both by the zoning ordinance in effect at the time suit was filed, and as supplemented by the amendment made after the filing of the suit, bear no substantial relation to the public health, safety or welfare.

Fourth, that the Plaintiffs should be permitted to utilize the westerly 350 feet of Parcel 1 as "Office, Research and Compatible Use" property to constitute a buffer to property eventually to be developed to the north and east, and to property lying south of the subject tract.

Fifth, that the remainder of Plaintiff's property, with the exception of the aforesaid westerly 350 feet of Parcel 1, should be permitted to be used by the Plaintiffs as multiple family dwelling property under Classification "F" of the ordinance in question.

Sixth, that building permits should be ordered issued, permitting the construction of "Office, Research and Compatible Use" structures on the westerly 350 feet of Parcel I and all of Parcel II, in accordance with the restrictions and limitations imposed by the ordinance on multiple family dwelling areas classified as "F".

The Court has read the authorities cited by counsel but feels both counsel are well acquainted with the law of the subject and that numerous citations of authority by the Court are not necessary.

The Court requests that counsel for the Plaintiffs tender to it, as soon as possible, a decree in conformity with the findings and opinions herein expressed.
Dated this 12th day of May, 1965.

APPENDIX B-1

Trial Court Decree, May 1965

Decree entered 5/20/65.

DECREE

This cause coming on for hearing on the Complaint as amended, and the Answer thereto, and the Court having heard the testimony of the witnesses, having considered the exhibits received in evidence, having by agreement of the parties inspected the property in question and the surrounding areas, as well as the other relevant areas in the City of Highland Park, and having heard the arguments of counsel and considered the authorities submitted by them, and being fully advised in the premises, the Court finds that the following facts have been proved by clear and convincing evidence:

1. The plaintiffs' property involved in this proceeding is not presently suitable or marketable for any use permitted by the "G-1, Office, Research and Compatible Use" classification of the Highland Park zoning ordinance, nor will it be suitable or marketable for any such use in the foreseeable future.

2. There is no present demand for the property involved in this proceeding for any use permitted under the said "G-1" classification, nor will there be any demand for the property for any such use in the foreseeable future.

3. The existing "G-1" zoning creates an extreme hardship upon the plaintiffs, inasmuch as it prevents the sale or development of plaintiffs' property for any feasible use and greatly depresses its market value.

4. The hardship on the plaintiffs is not offset by any benefit to the public, inasmuch as there is no benefit to the public from the present "G-1" zoning property.

5. Due to the character of the area in which it is located, the plaintiffs' property is unsuitable and unmarketable for the single-family residential use for which it was zoned prior to the filing of the Complaint herein. There is no reasonable prospect of development of plaintiffs' property for any use permitted by the "A" or "B-1" classifications of the zoning ordinance.

6. There is a present need for additional multiple-family dwellings in the City of Highland Park of the type proposed to be built on plaintiffs' property by the Anvan Corporation, and the plaintiffs' property is suitable for such use.

7. The use of plaintiffs' property for such multiple-family dwellings would have no adverse effect upon the public or the surrounding areas.

8. The classification of the property involved in this proceeding as either "G-1, Office, Research and Compatible Use" or "A" or "B-1" single-family residential use is arbitrary, unreasonable and confiscatory, and bears no reasonable or material relation to the public health, safety, morals, comfort or welfare.

The Court further finds that there is no merit to the defendant's contention that the plaintiffs have failed to exhaust their administrative or local remedies.

NOW THEREFORE, the Court finds the issues in favor of the plaintiffs and against the defendant, and IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

The classification of the portions of the plaintiffs' property described as

> PARCEL 1: All that part of the North Quarter of the North East Quarter of Section 34, Township 43 North, Range 12, East of the 3rd P.M., lying Easterly of a line described as follows: Beginning at a point on the South line of the North half of the North East Quarter of the North East Quarter of said Sec-

tion, which is 135 feet Easterly of the Easterly right-of-way line of the Chicago and North Western Railway Company measured at right angles thereto and extending North Westerly to a point on the North line of said Section which is 174.59 feet Easterly of the Easterly right-of-way line of said railway company, measured along the North line of said Section in Lake County, Illinois, except that which lies West of a line which is 350 feet East of, perpendicular to, and parallel with the East right-of-way line of Skokie Valley Highway.

PARCEL 2: The West 288.5 feet of the North West Quarter of the North West Quarter of the North West Quarter of Section 35, Township 43 North, Range 12, East of the 3rd P. M., in Lake County, Illinois;

as "G-1", Office, Research and Compatible Use" under the Highland Park zoning ordinance is hereby declared to be unconstitutional and void. The classification of said portions of plaintiffs' property for either "A" or "B-1" single-family residential use under the said ordinance is also declared to be unconstitutional and void. The defendant is hereby ordered to permit the said portions of plaintiffs' property to be used for multiple-family dwellings under classifications "F" of the Highland Park zoning ordinance, and to issue forthwith the necessary building permits to allow construction of such multiple-family dwellings on the above described portions of the property in accordance with the restrictions and limitations imposed by the "F" classification of the ordinance.

APPENDIX C

Appellate Court Decision

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT:

Plaintiffs, Vito and Della Fiore, brought this suit against the City of Highland Park seeking a declaratory judgment that the municipal zoning, as applied to their property, was invalid. After a full hearing, the trial court entered such judgment and the defendant City has appealed.

Plaintiffs' property consists of approximately 21 acres, purchased in 1947 for $16,500. Five of the 21 acres are not included in this lawsuit. The plaintiffs maintained their residence and conducted a nursery operation on about seven or eight acres of this land and the balance of the land has remained idle. When the plaintiffs purchased the land, part of it was zoned "A, Country Estate" —a residential use—requiring a minimum lot size of three acres, and the other part "B-1"—also a residential use—requiring a minimum lot size of 20,000 square feet.

The west edge of the tract, approximately 750 feet in length, fronts on Skokie Highway—a highly travelled four-lane arterial highway—which offers direct access to plaintiffs' property to northbound traffic only. The land immediately across the highway is zoned "I" industrial and is vacant except for several advertising signboards. Across the highway and immediately to the south of the tract in question, are a carwash and two gasoline service stations. The "I" industrial zoning across the highway would permit apartment or office and research use, as well as the light industrial or commercial use.

Immediately to the north is the Bob 'O Link golf course. To the north of that is the Sunset golf course and, adjoining the highway, a tract of land owned by the Encyclopedia Britannica. The latter tract consists of ap-

proximately 10 acres and is either zoned "G-1, Office, Research and Compatible Use" or is intended for such use. It is undeveloped, and the encyclopedia company is attempting to sell it. To the east of the land in question is a tract owned by the park district, which is unimproved. Immediately to the south, adjoining the highway, is a 6 acre vacant piece of land referred to as the "Johnson" tract. To the south of this, and adjoining the 5 acres of plaintiffs' land which is not a part of this suit, is a high class residential development. Plaintiffs' 5 acre parcel of land which is not a part of this suit is zoned residential and connects with the land in litigation in such a manner that it is referred to herein as an "axe handle." Most of the general area, as most of the City of Highland Park, is developed with single family residences.

The plaintiffs in December 1963 filed a petition with the defendant seeking to have 300 feet in width of their land along Skokie Highway rezoned "G-1", for office and research use, and the balance of the 16 acre tract rezoned "F" for multiple family construction. Hearings were held in February and March of 1964 but no findings or recommendations were made by the City Plan Commission. In June of 1964, the Plan Commission indicated it would hold new hearings on the plaintiffs' petition to consider the rezoning of these premises, along with other property along Skokie Highway, as a part of an overall plan. The plaintiffs then instituted this suit. Subsequently, the City rezoned all of the plaintiffs' land here in question, for office and research use, thus denying their petition insofar as it sought to have a part of their land rezoned for apartment use.

As a threshold question, we must first examine the defendant's contentions that the filing of this suit before the City Plan Commission had concluded its hearings, and the presentation of different and additional evidence at the trial from that presented at the legislative hearings, contravenes the doctrine that the property owner must exhaust administrative remedies before seeking a declaratory judgment, as set forth in *Bright* v. *City of Evanston*, 10 Ill. 2d 178, 180, 181 (1957).

This is not an administrative review proceeding and the presentation of evidence bears no relation to the *Bright* rule. As a practical matter, the evidence required to prevail before the zoning body is often different, both as to quantity and nature, than that necessary to sustain the burden of proof subsequently in a court of law. Generally, an adverse ruling by the administrative or legislative agency would tend to place the landowner at a disadvantage. Under such circumstances, we would expect plaintiffs to offer somewhat different evidence in the trial before a court of law than that presented before the Plan Commission, and find no reason to preclude new evidence as such, if not otherwise objectionable.

Subsequent Supreme Court decisions have clearly indicated that the *Bright* rule is not jurisdictional. It is an expression of judicial policy which seeks to assure the local authority the opportunity of correcting errors and settling disputes at that level, thus avoiding the delay and expense of judicial intervention. *Westfield* v. *City of Chicago,* 26 Ill. 2d 526, 528 (1963). Plaintiffs here sought relief from the local authority, which either refused to act on its petition, or substituted the Commissions' overall plan for rezoning the land in the area for the specific relief sought by plaintiffs' petition. After suit was filed and long prior to the trial of this cause, the Plan Commission acted on its own overall plan in a manner which denied the zoning sought by plaintiffs. Under these circumstances, to require plaintiffs to proceed further before the Plan Commission would have been a useless act. Such futility is not the purpose of the *Bright doctrine. Van Laten* v. *City of Chicago,* 28 Ill. 2d 157, 159, 160 (1963).

It would serve no useful purpose to reiterate here the oft-repeated factors to be considered in determining whether a given zoning ordinance is invalid as applied to particular property. See: *Myers* v. *City of Elmhurst,* 12 Ill. 2d 537, 543, 544 (1958); *La Salle Nat. Bank* v. *County of Cook,* 12 Ill. 2d 40, 46, 47 (1957); *Hoffmann* v. *City of Waukegan,* 51 Ill. App. 2d 241, 244 (1964).

Such factors will be referred to herein insofar as they are relevant to the determination of this case.

As noted, this case comes to us in a somewhat different posture than most zoning cases. After the plaintiffs had filed their petition to rezone their property, the City rezoned this land, along with other land along the east side of Skokie Highway, "G-1, Office, Research and Compatible Use" (hereinafter called "O & R"). The City's action at this time was a part of an overall plan as to this area and amounted to a denial of plaintiffs' petition.

Plaintiffs' basic contention is that their property is rendered virtually useless by the O & R zoning, and that such zoning ordinance bears no substantial relationship to the public welfare. The evidence indicates that the City of Highland Park has little land that is presently being used or developed for office and research use; and that this type of land use has developed extensively in the area northwest of Chicago, in the direction of the O'Hare airport, rather than in the area due north of Chicago and in the vicinity of the City of Highland Park.

The Encyclopedia Britannica property, situated a short distance north of the plaintiffs' property, has been offered for sale as O & R property since 1961 and virtually no inquiries have been received. The same can be said for other O & R land in the area, except that as to the other land, there have been less extensive promotional activities in attempting its sale. The same factual circumstances exist relative to the vacant land across the highway, which can be used for office and research purposes.

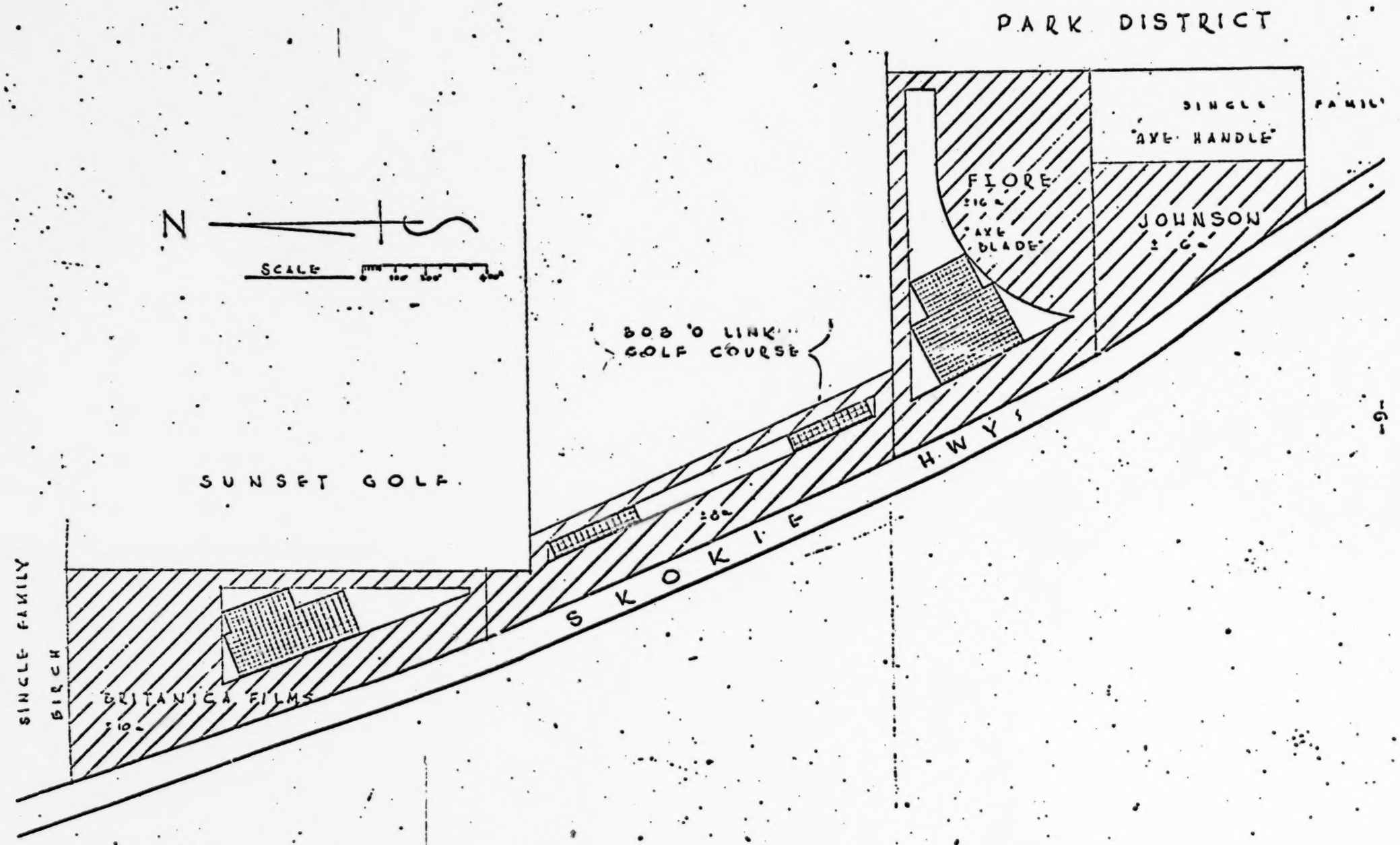
The defendant argues that the Encyclopedia Britannica land has not been sold because the asking price is too high. It would seem, however, that if the land were desirable for O & R use, the intensive efforts which were made seeking its sale, would at least have produced some offers to test the firmness of the asking price. Also, a real estate broker who was engaged to sell the land, sent out 7,500 brochures to potential purchasers, describing the property without mention of the price. Yet, no inquiries were received.

The plaintiffs have made a rather intensive, but brief, effort to promote the sale of their land under its O & R zoning, and while it may be questioned whether they truly desired to sell their land as O & R, their efforts—which appeared both substantial and sincere—likewise brought no inquiries of substance. There appears little need within this community, immediate or potential, for the O & R zoning classification given to plaintiffs' land.

From the evidence adduced, it appears that the failure of office and research development in the City of Highland Park may be attributed to a shortage of labor supply for such business concerns, a lack of housing for employees of such concerns, and an inadequacy of public transportation in the area. The restrictions placed by the City of Highland Park under its O & R zoning ordinance also drastically limit the attractiveness of such land for potential O & R development.

Under the defendant's zoning restrictions, the minimum lot size for O & R use is four acres; buildings cannot occupy more than 30 percent of the lot; the front yard must be at least 150 feet in depth with no parking permitted; side and back yards must be at least 50 feet; and the building height may not exceed 30 feet. The ordinance further provides that none of the following activities may be done in any building located within 500 feet of a residential zone, to-wit: testing, storing, cleaning, repairing or servicing. This provision is especially significant with reference to the plaintiffs' land because of its proximity to residential zones, and these restrictions would render only a small portion of the land available for the O & R use to which a majority of such potential O & R users would put the land. As a result, plaintiffs' land is rendered highly unmarketable by the defendant's zoning.

The restrictive effect of the above provisions is graphically portrayed by the following exhibit, which was admitted in evidence and which indicates the size and location of O & R buildings permitted under such ordinance with reference to plaintiffs' land and the adjoining properties.


PARK DISTRICT
SINGLE FAMILY
AXE HANDLE
FIORE
±16 a
AXE BLADE
JOHNSON
± a
N
SCALE
BOB 'O LINK
GOLF COURSE
SUNSET GOLF
SKOKIE
HWY
SINGLE FAMILY
BIRCH
BRITANICA FILMS
±10 a

We recognize that the zoning ordinance adopted by the defendant is presumed valid, and the burden of showing it unreasonable and oppressive, as applied to plaintiffs' land, rested upon them. *Camboni's, Inc.* v. *Du Page County,* 26 Ill. 2d 427, 432 (1963); *First Nat. Bank* v. *County of Lake,* 7 Ill. 2d 213, 225 (1955). In challenging the ordinance's validity as applied to their property, the burden was on the plaintiffs to overcome this presumption, and to prove by clear and convincing evidence that the ordinance was unreasonable and unrelated to public health, safety or welfare. *Bennett* v. *City of Chicago,* 24 Ill. 2d 270, 273, 274 (1962); *Hoffmann* v. *City of Waukegan,* 51 Ill. App. 2d 241, 244 (1964).

Due to this presumption, if it appears from all of the evidence that there is justification for a legitimate difference of opinion as to the reasonableness of the ordinance, the legislative judgment of the City must then be upheld. *Urann* v. *Village of Hinsdale,* 30 Ill. 2d 170, 175 (1964); *First Nat. Bank* v. *County of Lake,* 7 Ill. 2d 213, 226 (1955); *Bowler* v. *Village of Skokie,* 57 Ill. App. 2d 321, 325 (1965). However, the fact that there is a difference of opinion among the witnesses—lay and expert—, does not mean that the court must find that the reasonableness of the ordinance is debatable and, hence, uphold the ordinance. In cases of this nature, a court must expect differences of opinion. It is for the court to determine from all of the facts whether the differences of opinion are reasonable and justifiable. *Myers* v. *City of Elmhurst,* 12 Ill. 2d 537, 544 (1958); *La Salle Nat. Bank* v. *County of Cook,* 12 Ill. 2d 40, 47 (1957).

To sustain the validity of a zoning classification, it must bear a substantial relation to the public health, safety, comfort, morals or general welfare. *Marquette Nat. Bk.* v. *County of Cook,* 24 Ill. 2d 497, 501, 502 (1962); *First National Bank* v. *County of Cook,* 15 Ill. 2d 26, 31 (1958). We are of the opinion that the trial court was correct in finding no such relation here. The community need for such zoning, present or future, was

not present. There was other suitable land so-zoned, or at least zoned so as to permit office and research use, among others. The lack of interest in such development in this community indicated that presently the land available for such use was more than adequate.

Nor did the zoning appear to be the result of careful and thoughtful planning, as urged by the defendant. The parcel of land immediately south of plaintiffs' and designated on the exhibit as the "Johnson" tract, was rezoned O & R at the same time as plaintiffs' land. Yet because of the 500 foot set back from residential zones required of buildings to be used for the most common O & R usages, no part of this land may be used for such O & R usages, even though it is so-zoned. It appears from the record that this limitation was not the result of careful planning but, rather, of oversight. The set back, parking and yard restrictions, as applied to the properties on the exhibit, likewise indicate inadvertent planning.

As to the surrounding area, the O & R rezoning adopted by the defendant somewhat diminished in value the single family residential properties to the south. It had no adverse effect on the park district land to the east, the Bob 'O Link or the Sunset golf courses to the north, the Encyclopedia and other lands further north, or the industrial and residential lands west of Skokie Highway. The apartment use to which the plaintiffs seek to devote the land, affects the surrounding area in much the same manner. The only difference is that defendant's witnesses testified that this proposed use would have a greater adverse effect on the nearby residential area than would the O & R use. There was no evidence, however, as to the quantity of this adverse effect.

The uses and zoning of the surrounding areas do not dictate that either the O & R or the apartment zoning is more suitable for the property in question; and it cannot really be said that characteristics of the surrounding area suggest one use over the other. This is true because of the absence of a pattern which suggests the use to

which this land should be put, and due to the lack of evidence of significant harm to the surrounding area by either the O & R or apartment use of this land.

It is fair to conclude from the record that there is a need for additional apartment facilities in the community. The potential developer of plaintiffs' land—the real party in interest—has contracted to purchase plaintiffs' land for $250,000 conditioned upon obtaining the rezoning. Defendant's own witnesses concede that the type of apartment complex contemplated would be highly desirable if located in the right place, and there is no showing in the record that plaintiffs' land was not in the right place. Clearly, in view of the apparent lack of need and interest in O & R land in the community, coupled with the severe effects of the set back restrictions on plaintiffs' land, there cannot be anticipated any reasonably immediate use of plaintiffs' land for O & R purposes. Under these circumstances, the zoning classification given plaintiffs' land serves no public purpose and most certainly deprives the plaintiffs' land of considerable value. *Chi. Title & Trust Co.* v. *City of Harvey,* 30 Ill. 2d 237, 239, 141 (1964).

Courts have often stated that the validity of a zoning ordinance as applied to a specific piece of property depends on the sum total of the particular facts found in each case. *First National Bank* v. *County of Cook,* 15 Ill. 2d 26, 31 (1958); *Koplos* v. *City of Rockford,* 62 Ill. App. 2d 268, 272 (1965). The loss in value of plaintiffs' land is not, in itself, sufficient to justify setting aside an ordinance as unreasonable. *Koplos* v. *City of Rockford, supra.* When, however, the sum of the numerous factors considered together show that there is no reasonable basis in the public welfare for requiring plaintiffs to suffer such a loss, the presumption as to the validity of the ordinance is overcome. *Marquette Nat. Bk.* v. *County of Cook,* 24 Ill. 2d 497, 501, 502, 503 (1962); *Krom* v. *City of Elmhurst,* 8 Ill. 2d 104, 115, 116 (1956). Where the gain to the public is small as compared with the hardship imposed upon the owners of the land by a certain zoning restriction, no valid basis exists for the exercise of the police

power. *First National Bank* v. *County of Cook,* 15 Ill. 2d 26, 31 (1958); *Northern Tr. Co.* v. *City of Chicago,* 4 Ill. 2d 432, 438 (1954). We hold that the trial court was correct in finding that the plaintiffs had sustained their burden in establishing the invalidity of the O & R zoning ordinance as applied to their property. *La Salle Nat. Bank* v. *County of Cook,* 12 Ill. 2d 40, 47, 48 (1957).

The defendant has also argued that plaintiffs' land was equally suitable for single-family residential development. Such fact, if true, would not be determinative of any issue in this case. When the plaintiffs first sought to have their property rezoned, it was zoned for single-family residential use. Had the property remained so-zoned, the validity of such zoning, measured by the standards to which we have referred, would properly have been an issue in determining whether the plaintiffs' petition was rightly denied. By the time this matter came to trial, however, the legislative body had already made a determination as to the classification of this property. It had decided that it was in the interest of the general welfare that this land be zoned O & R—not single-family.

What the plaintiffs are attacking in this court is the denial of their petition seeking multiple dwelling use. What they must challenge is the validity of the existing zoning as applied to their land and not the validity or suitability of any other prior or possible alternative zoning classifications. The presumption favoring the validity of the zoning ordinance applies only to the existing legislative determination and not one which that body itself had previously determined to no longer be in the public interest. It is neither the province nor the duty of the courts to assume the role of a zoning body and determine the most appropriate or suitable zoning for a parcel of land. *Treadway* v. *City of Rockford,* 24 Ill. 2d 488, 493 (1962).

The defendant relies on the *Treadway* case as indicative of the situation in this case. It argues that because the trial court held the O & R zoning invalid as applied

to plaintiff's land, it reverted or "remained" in its prior single-family zoning classification. This is not the case, however. The amending ordinance was general in that it did not apply solely to the property in question. It rezoned several parcels in this general area to O & R use. As a part of the amending ordinance, it was provided that all other ordinances in conflict with the provisions hereof "are hereby repealed." The trial court decreed that the classification of plaintiffs' property as "C-1, Office, Research and Compatible Use" under the zoning ordinance, was void. It made no finding that any other part of the amending ordinance, including the repeal of inconsistent ordinances, was void. The effect of the decree was to leave the property "unzoned." *Sinclair Pipe Line* v. *Richton Park,* 19 Ill. 2d 370, 377-379 incl. (1960); *Harshman* v. *City of DeKalb,* 64 Ill. App. 2d 347, 352 (1965).

Insofar as the trial court decreed that the single-family zoning restriction was void as applied to plaintiffs' land, it decree was obiter, dicta and invalid; and the further part of the decree which provided that "The defendant is hereby ordered to permit the said portions of plaintiffs' property to be used for multiple-family dwellings under the classifications "F" of the Highland Park Zoning Ordinance * * *", is likewise improper and void in that it is too broad. Thereby, the court assumed the legislative function of determining the ultimate zoning classification of the property in question. *Reeve* v. *Village of Glenview,* 29 Ill. 2d 611, 616, 617 (1963); *Harshman* v. *City of DeKalb,* supra, 352, 353. The most that a court may do after declaring an existing zoning ordinance void as applied to certain property is to find that the specific use contemplated by the owner is reasonable and may be permitted.

Under such circumstances, the court may frame its decree in the light of the evidence before it with reference to the specific proposed use; and may decree such contemplated use to be a reasonable one. Such decree neither impinges upon the legislative function, nor in effect leaves

the property unzoned, with its potential problem of further litigation due to further rezoning by the municipality; and it limits plaintiffs' use of the land to that contemplated and indicated by the record. *Sinclair Pipe Line* v. *Richton Park,* supra, 379; *Harshman* v. *City of DeKalb,* supra.

In the case at bar, the plaintiffs presented evidence as to the nature of the apartment complex they intended to construct on these premises. The decree of the trial court should be framed with reference to the evidence of this intended use and permit such use only, rather than any permitted under the applicable multiple-family zoning restriction. If the court finds that such evidence is not sufficient to enable it to intelligently frame its decree, it should hear additional evidence pertinent to such use.

That part of the decree of the trial court which declared the existing zoning void, as applied to the property in question, is affirmed; and that part of the decree which adjudged the single-family zoning restriction void as applied to plaintiffs' land, and which ordered the defendant to permit the said portions of the plaintiffs' property to be used for multiple-family dwellings under the "F" classification of the zoning ordinance, is reversed; and the cause is remanded to the trial court with directions to frame its decree pertaining to the permissive use of the land in question with reference to the evidence of plaintiffs' contemplated use and to hear further evidence in this regard, if necessary.

Affirmed in part and reversed in part; and remanded with directions.

MORAN, P. J., and ABRAHAMSON, J., concur.

APPENDIX D

Report of Plan Commission, February 1967

February 2, 1967

HIGHLAND PARK PLAN COMMISSION
REPORT OF THE ZONING SUB COMMITTEE
ON PUBLIC HEARING No. 15-66.

Hearing on the subject matter was held before a Sub Committee of the Highland Park Plan Commission in the Council Chambers of the City Hall in the City of Highland Park, on December 6, 1966, beginning at 7:30 P.M. pursuant to the published notice.

The hearing panel consisted of the following members of the Plan Commission: Harris, Sachs, Schiller, Schrayer, Weeks, Wineman, and Stuart Bernstein, who served as Chairman.

The three (3) parcels of property of the subject of this hearing are described legally as follows:

PARCEL 1.

All that part of the North Quarter of the North East Quarter of Section 34 and the Northwest Quarter of Section 35, Township 43 North, Range 12, East of the Third P.M., lying Easterly of a line of the North Half of the North East Quarter of the North East Quarter of said Section, which is 135 feet Easterly of the Easterly right-of-way line of the Chicago and North Western Railway Company measured at right angles thereto and extending North Westerly to a point on the North line of said Section which is 174.59 feet easterly of the Easterly right-of-way line of said railway company, measured along the North line of said Section except the part thereof taken for Skokie Valley Road;

PARCEL 2.

A triangular parcel approximately 5± acres adjoining Parcel 1 with approximately 890 feet frontage on Skokie Valley Road. The North line of said property is approximately 600 feet deep, the East line being 660 feet.

PARCEL 3.

The West 250 feet of Bob-O-Link Country Club which lies parallel to Skokie Valley Road (State Highway #41) and presently zoned "G-1" in the South East Quarter of Section 27, Township 43 North, Range 12 East of the Third P.M., Highland Park, Lake County, Illinois.

The three parcels here before the Commission were the subject of extensive hearings in 1964. Prior to that time, the parcels had been zoned B-1, single family residential. The owner of one of the parcels petitioned to rezone his parcel to F, Multiple Family, or G-1, Office, Research and Compatible Use. The Commission broadened the proceedings to include the other two subject parcels and a fourth not here involved. In July, 1964, the Commission recommended to the City Council that all four parcels be rezoned to G-1, and an ordinance to this effect was adopted by the Council in September, 1964.

In June, 1964, before the Commission had concluded its hearings, the original petitioner instituted legal proceedings which he amended after the Council acted in September, attacking the G-1 zoning with respect to a part of his parcel as arbitrary and unreasonable and requesting multiple family use for that portion. After trial, the Circuit Court of Lake County granted the requested relief.

The Appellate Court affirmed the part of the decree voiding the G-1 classification, but reversed that part which held single-family zoning void and which ordered the City to permit use under the F classification. The Appellate Court remanded the cause to the trial court

with directions to reframe its decree relating to the permissive use of the land with reference to the evidence of the contemplated use for multiple family, and directed the taking of further evidence, if necessary. The apparent purport of the Appellate Court decision was to allow the use of the premises for multiple-family purposes provided the decree was framed in terms of particular use and not in terms of the F classification. The City has petitioned the Illinois Supreme Court for Leave to Appeal, contending, *inter alia,* the lower courts erroneously voided the G-1 zoning and that in any event the effect of such voiding would be to reinstate the prior B-1 single-family zoning.

The present proceeding before the Board is on a reference by the City Council to rezone the three parcels here involved to B-1. At the public hearing conducted by a panel of the Commission, counsel for the owners of the property now in litigation—the Fiore property—objected to the hearings on the basic ground that since the decree of the Circuit Court determined that a portion of the property could be used for multiple-family purposes, any action by this Commission rezoning the property would be an interference with the judicial process and a nullity. He contended that, therefore, the Commission lacked jurisdiction to recommend any action with respect to the Fiore property.

The ultimate legal implications of the decree of the Circuit Court on the use to which the Fiore property may be put is not an issue which should inhibit the actions of this Commission. This matter has not yet run its judicial course. The City's Petition for Leave to Appeal is still pending; the full significance of the remand by the Appellate Court may not be known without further litigation.

It thus appears that the results of the litigation are neither as certain nor as conclusive as counsel would have it.

In any event, as an appointive agency of the City Council, the Commission is hardly in a position to deter-

mine its own jurisdiction. We may only recommend to the City Council, and further action of the Council is required before any recommendation of the Commission may be implemented. Another significant factor here is that the present proceeding relates not only to the Fiore property but the Johnson and Bob-O-Link parcels as well, —the latter two not being involved in the litigation. We, therefore, reject the contention that we lack jurisdiction to consider this matter.

There is an apparent superficial inconsistency in our being asked to consider rezoning these three parcels to B-1 when the City is simultaneously urging the Supreme Court, with respect to one of the parcels, that the G-1 classification is proper, and if not, that then the zoning automatically reverts to B-1. If the City is correct in its legal arguments, then we are being asked to do a superfluous act.

However, we find nothing unusual in the efforts of the City to protect the over-all planning and zoning of the City by any number of alternative procedures.

When the Commission recommended G-1 zoning for this area it was not our intent to suggest that the then existing B-1 zoning was in no event appropriate. While we felt that the properties in question were highly desirable for a continuation of the B-1 single-family residential development in that area, we also felt that it was desirable to have a G-1 district in Highland Park. In our consideration of the areas suitable for G-1 development, the properties in question were found to be one of the few areas in Highland Park which met most all of the basic requirements for G-1 development. We did not intend that as between F and B-1, that F was more appropriate. In fact, our consideration of F as the alternative proposal during our 1964 hearings led us to conclude that F was the least desirable for this area among the possibilities of G-1, F or the existing B-1.

CONCLUSIONS AND RECOMMENDATION:

It is our view that multiple family use of any of the parcels here involved would be detrimental to Highland Park and its over-all plan for the limited development of multiple family uses within the areas which have been selected and zoned for that purpose. If our judgment that G-1 is the most desirable use of this property is ultimately held to be an arbitrary judgment in the constitutional sense, then we strongly recommend that the City Council reinstate the B-1 classification, either by persisting in its alternative legal argument that the prior zoning becomes effective on voiding of the amending ordinance, or by passing a new ordinance again establishing that classification for this area.

We are aware that this may invite further litigation. However, the Commission views this is a matter of utmost importance for Highland Park and the course of its future development, and we urge the City to pursue every legal means available to it to prevent multiple family use for this area.

Respectfully submitted,
Zoning Sub Committee
HIGHLAND PARK PLAN COMMISSION
By: /s/ Stuart Bernstein
Stuart Bernstein, Chairman

Adopted this 7th day of February 1967.
HIGHLAND PARK PLAN COMMISSION
By: /s/ Thomas C. Nathan
per NTS
Thomas C. Nathan, Chairman

At a regular meeting of the Highland Park Plan Commission at which a quorum was present, the attached report and recommendation was considered:

The result of a vote on the matter was as follows:

Present	6 members
Voting for adoption	6
Voting against adoption	0

APPENDIX E

Ordinance Rezoning, April 1967

AN ORDINANCE AMENDING
"THE HIGHLAND PARK ZONING
ORDINANCE OF 1947", AS AMENDED.

WHEREAS, in a decree entered May 20, 1965, in a proceeding in the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois entitled "Vito Fiore and Della Fiore, his wife vs. City of Highland Park," General No. 64-4066, it was decreed that the classification of the properties hereinafter described as "G-1, Office, Research and Compatible Use" was void, and

WHEREAS, the Appellate Court of the State of Illinois, Second District, in a decision filed October 28, 1966, in Case No. 65-150, held that the effect of said decree was to leave the properties hereinafter described "Unzoned," and

WHEREAS, the Supreme Court of the State of Illinois on March 28, 1967, denied a petition for leave to appeal from said decision of the Appellate Court, and

WHEREAS, in the judgment of the Council of the City of Highland Park the existence of any "Unzoned" land within the City of Highland Park is wholly inconsistent with the great care which has been consistently and diligently exercised in determining and delineating the district boundaries and use classifications of the entire land area within the City of Highland Park, and

WHEREAS, as a result of the action of the Courts decreeing that the properties hereinafter described are now "Unzoned," the Plan Commission of the City of Highland Park has held a public hearing on a proposed zoning of said properties and has submitted to the Council its report and recommendation.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF HIGHLAND PARK, COUNTY OF LAKE, STATE OF ILLINOIS.

SECTION I. That the report and recommendation of the Highland Park Plan Commission on Public Hearing No. 15-66, dated February 7, 1967, be approved and by reference incorporated in and made a part of this ordinance.

SECTION II. That the premises described in Section III of this amending ordinance be and the same are hereby reclassified and rezoned from "G-1" Office, Research and Compatible Use District and the "Unzoned" classification decreed by the decision of the Appellate Court, Second Division, in Case No. 65-150 to "B-1" Twenty Thousand Square Foot Single Family Dwelling District and that said premises shall from and after the effective date of this ordinance, be subject to all the rights, privileges, restrictions and regulations applicable to property in the "B-1" Twenty Thousand Square Foot Single Family Dwelling District, under the Highland Park Zoning Ordinance of 1947, as amended.

SECTION III. That the districts and boundaries thereof as shown upon the "Use District Map" accompanying and made a part of the Highland Park Zoning Ordinance of 1947, as amended, by Section 4-6 thereof, be and the same are hereby amended to exclude the following described property from the "G-1" Office, Research and Compatible Use District and to include said property within the "B-1" Twenty Thousand Square Foot Single Family Dwelling District:

PARCEL 1. All that part of the North one-half of the Northeast Quarter of the Northeast Quarter of Section 34, Township 43 North, Range 12 East of the 3rd P.M., lying Easterly of a line described as follows: Beginning at a point on the South line of the North Half of the North East Quarter of the North East Quarter of said Section, which is 135

feet Easterly of the Easterly right-of-way line of the Chicago and North Western Railway Company measured at right angles thereto; and extending North Westerly to a point on the North line of said Section which is 174.59 feet Easterly of the Easterly right-of-way line of said railway company, measured along the North line of said Section in Lake County, Illinois, except that part lying West of a line which is 350 feet East of, perpendicular to and parallel with the East right-of-way line of Skokie Highway (U.S. 41).

PARCEL 2. The West 288.5 feet of the North West quarter of the North West quarter of the North West quarter of Section 35, Township 43 North, Range 12, East of the 3rd P.M., in Lake County, Illinois.

SECTION IV. That all ordinances or parts of ordinances in conflict herewith are hereby repealed; provided, however, that nothing herein contained shall affect any rights, actions or causes of action which shall have accrued to the City of Highland Park prior to the effective date of this ordinance.

SECTION V. This ordinance shall be in full force and effect from and after its passage, approval, recordation and publication, according to law.

SAMUEL LAWTON
Mayor Pro Tem

ATTEST:
ROBERT W. ATTERIDGE
City Clerk

Passed: 4/10/67
Approved: 4/10/67
Recorded: 4/11/67
Published: 4/20/67

APPENDIX F

Supplemental Decree of May 18, 1967

This cause coming on for hearing pursuant to the Mandate of the Appellate Court for the Second Judicial District, filed in the Office of the Clerk of this Court on April 21, 1967, and the defendant having been given due and proper notice of this hearing in compliance with Rule 369(c) of the Supreme Court of Illinois, and the Court having heard additional evidence of plaintiffs' contemplated use of the land in question, and having heard evidence as to the enactment of an ordinance by the defendant City on April 10, 1967 which purported to rezone the land in question to a "B-1" single family dwelling classification, and having heard the arguments of counsel, and being fully advised in the premises.

The Court Finds as Follows:

1. According to the evidence presented at this hearing, the Anvan Corporation intends to construct 168 apartment units on the land in question. These units will consist of approximately 10% studio apartments, 50% one-bedroom apartments, and 40% two-bedroom apartments. These 168 units will be contained in either three or four buildings. The buildings will consist of three stories each, and the total height of each building will not exceed thirty-two feet from ground level. The buildings will be equipped with elevators. Underground parking facilities will be located underneath each building, and there will be one such parking space for each apartment in the building. The floors of the buildings will be made of concrete. All apartments, except the studio apartments, will be equipped with automatic dishwashers and garbage disposals. A swimming pool will be constructed on the land.

2. The foregoing evidence is sufficient for this court to determine that the intended use of the property is a reasonable one, and the court does find that the proposed

use is reasonable and proper for the property in question and the surrounding area.

3. The evidence presented by plaintiffs at this hearing contemplates 168 units, whereas the testimony at the original trial of this cause was to the effect that 144 units would be built (Abstract, p. 146). The evidence at this hearing is to the effect that the apartment units will be contained in three or four buildings, whereas plaintiffs' Exhibit 14 at the original trial, an artist's rendering of the apartment complex proposed at that time, shows seven apartment buildings and a garage building. The evidence at this hearing indicates that the buildings will be three stories in height, whereas plaintiffs' Exhibit 14 at the original trial portrayed buildings two stories in height. The court finds that these changes from the original proposal are reasonable and that the increase in the number of apartments, the addition of one story to the buildings, and the decrease in the number of buildings, will not result in a less desirable development of the property than that proposed at the original trial of this cause. The use now proposed is preferable in some respects to that proposed at the time of the original trial, and in no respect is it less reasonable or desirable than the original proposal. The land in question consists of approximately ten acres, and, under the "F" zoning ordinance of the defendant, it would be permissible to build approximately 288 apartment units on the property. The proposed 168 units are, therefore, approximately 120 units less than would be permitted under the defendant's "F" multiple-family zoning classification. The ordinance contains no limitation as to the number of stories, but does contain a 35 foot height limitation. The proposed three-story buildings will be within that limitation. The decrease in the number of buildings will result in a greater amount of open space on the land, as will the location of parking facilities underneath the buildings, rather than in a separate garage building as originally proposed.

4. The court finds that the defendant had no authority to rezone the subject property to a single-family classi-

fication, as it purported to do by its ordinance of April 10, 1967, and further finds that said ordinance is void insofar as it does purport to affect the subject property.

Now Therefore, it is hereby ordered, adjudged and decreed as follows:

1. The defendant is hereby ordered to permit forthwith the construction of multiple-family dwellings on the plaintiffs' property involved in this proceeding, legally described as follows:

> PARCEL 1: All that part of the North Quarter of the North East Quarter of Section 34, Township 43 North, Range 12, East of the 3rd P.M., lying Easterly of a line described as follows: Beginning at a point on the South line of the North half of the North East Quarter of the North East Quarter of said Section, which is 135 feet Easterly of the Easterly right-of-way line of the Chicago and North Western Railway Company measured at right angles thereto and extending North Westerly to a point on the North line of said Section which is 174.59 feet Easterly of the Easterly right-of-way line of said railway company, measured along the North line of said Section in Lake County, Illinois, except that which lies West of a line which is 350 feet East of, perpendicular to, and parallel with the East right-of-way line of Skokie Valley Highway.
>
> PARCEL 2. The West 288.5 feet of the North West Quarter of the North West Quarter of the North West Quarter of Section 35, Township 43 North, Range 12, East of the 3rd P. M., in Lake County, Illinois.

2. The said multiple-family dwellings shall consist of 168 units, approximately 10% of which shall be studio apartments, approximately 50% of which shall be one-bedroom apartments, and approximately 40% of which shall be two-bedroom apartments. The 168 units shall be located in either three or four buildings, each consisting

of nor more than three stories and not exceeding 32 feet in height from ground level. Underground parking spaces shall be located under each building, and there shall be one underground parking space for each apartment unit. The floors of the buildings shall be constructed of concrete. Each apartment, except the studio apartments, shall be equipped with an automatic dishwasher and garbage disposal. A swimming pool shall be constructed on the land.

3. The construction of the aforesaid apartment units shall be done in a manner which will comply with all applicable requirements of the defendant's current "F" multiple-family zoning ordinance and with the applicable provisions of the defendant's Building Codes.

4. The ordinance enacted by the defendant on April 10, 1967, which purported to rezone the plaintiffs' land to a "B-1" single family classification, is hereby declared to be void and of no effect insofar as it purports to apply to plaintiffs' property involved in this proceeding.

5. The court hereby reserves jurisdiction of the subject matter and of the parties hereto for the purpose of enforcing the terms of this supplemental decree.

Enter: /s/ Charles S. Parker,
Judge.

Dated this 18th day of May, 1967.

APPENDIX G

Opinion of the Appellate Court of Illinois, Second District

Mr. Justice Davis Delivered The Opinion Of The Court:

After giving due consideration to the peripheral contentions advanced by the appellant City, we are of the opinion that the issue on this appeal is whether the decree below conforms to the mandate of this court in *Fiore* v. *City of Highland Park*, 76 Ill. App. 2d 62 (1966).

In that case the plaintiffs' basic contention was that their property was rendered virtually useless by the G-1 zoning, herin called O & R (Office and Research), and that such zoning ordinance bore no substantial relationship to the public welfare. The restrictive effect of defendant's O & R zoning restrictions was graphically portrayed by the exhibit set forth on page 70 of the opinion which indicated the size and location of O & R buildings permitted under such ordinance with reference to plaintiffs' land and the adjoining properties. At page 73 we stated:

> "It is fair to conclude from the record that there is a need for additional apartment facilities in the community. * * * Clearly, in view of the apparent lack of need and interest in O & R land in the community, coupled with the severe effects of the setback restrictions on plaintiffs' land, there cannot be anticipated any reasonably immediate use of plaintiffs' land for O & R purposes. Under these circumstances, the zoning classification given plaintiffs' land serves no public purpose and most certainly deprives the plaintiffs' land of considerable value."

And at page 74, the court considered the City's contention that the plaintiffs' land was equally suitable for single-family residential development, in these words:

"Such fact, if true, would not be determinative of any issue in this case. When the plaintiffs first sought to have their property rezoned, it was zoned for single-family residential use. Had the property remained so-zoned, the validity of such zoning, measured by the standards to which we have referred, would properly have been an issue in determining whether the plaintiffs' petition was rightly denied. By the time this matter came to trial, however, the legislative body had already made a determination as to the classification of this property. It had decided that it was in the interest of the general welfare that this land be zoned O & R—not single-family."

We there held that insofar as the trial court decreed that the single-family zoning restriction was void as applied to plaintiffs' land, its decree was obiter dicta and invalid; and that the further part of the decree which provided that "The defendant is hereby ordered to permit the said portions of plaintiffs' property to be used for multiple-family dwellings under the classification 'F' of the Highland Park Zoning Ordinance. . . ," was likewise improper and void in that it was too broad. It was our belief, and we stated, that the most that a court may do after declaring an existing zoning ordinance void as applied to certain property is to find that the specific use contemplated by the owner is reasonable and may be permitted.

At pages 76 and 77 we stated:

"In the case at bar, the plaintiffs presented evidence as to the nature of the apartment complex they intended to construct on these premises. The decree of the trial court should be framed with reference to the evidence of this intended use and permit such use only, rather than any permitted under the applicable multiple-family zoning restriction. If the court finds that such evidence is not sufficient to enable it to intelligently frame its decree, it should hear additional evidence pertinent to such use.

"That part of the decree of the trial court which declared the existing zoning void, as applied to the property in question, is affirmed; and that part of the decree which adjudged the single-family zoning restriction void as applied to plaintiffs' land, and which ordered the defendant to permit the said portions of plaintiffs' property to be used for multiple-family dwellings under the 'F' classification of the zoning ordinance, is reversed; *and the cause is remanded to the trial court with directions to frame its decree pertaining to the permissive use of the land in question with reference to the evidence of plaintiffs' contemplated use and to hear further evidence in this regard, if necessary.*

"Affirmed in part and reversed in part; and remanded with directions." (Emphasis Ours.)

On November 16, 1966, while the Petition for Rehearing was still pending before this court, the City published a notice that a hearing would be held before the Plan Commission on December 6, 1966, for the purpose of considering a rezoning of plaintiffs' property back to a single-family classification. The Petition for Rehearing was denied on November 30, 1966. The scheduled "hearing" before the Plan Commission was held on December 6, 1966, at which time the plaintiffs appeared by their counsel, and filed objections to the jurisdiction of the Plan Commission to take any action with respect to the property. No witnesses appeared at the "hearing," no one spoke in favor of the "rezoning," and the Plan Commission simply announced that it would take the matter under advisement.

Meanwhile, the City filed a Petition for Leave to Appeal to the Supreme Court, and there again sought to uphold the validity of the "O & R" Zoning Ordinance. The plaintiffs answered this petition and, on March 28, 1967, the Supreme Court denied it. Thereafter, on April 10, 1967, the City passed an ordinance purporting to "rezone" plaintiffs' property back to the same single-

family classification it had in 1963. On May 18, 1967, the court entered its supplemental decree, providing for a specific type of multiple-family use for the property and holding that the ordinance of April 10, 1967, purporting to rezone the property to single-family, was invalid.

On this appeal the City contends that under the doctrine of separation of powers between the three branches of government, the courts do not have the power to prevent an act of legislative discretion by a City Council exercised pursuant to a specific grant of authority the state legislature; that the General Assembly of the State of Illinois has granted to municipal corporations specific powers to enact ordinances creating zoning classification and regulations pertaining to the use of land within the municipality; and that the supplemental decree of the trial court entered May 18, 1968, 1967, violates the constitution of the State of Illinois in adjudging a zoning ordinance invalid on the grounds that the City Council of the City of Highland Park did not have the authority to enact such an ordinance.

The City further asserts that plaintiffs' property is suitable for use under its present single-family residential classification, and the burden is upon them to show by clear and convincing proof that the ordinance of April 10, 1967, is arbitrary and unreasonable; that there is no vested right in the continuance of a zoning ordinance; that the disposition of this case should be based upon the zoning classification of the subject property on the date of the supplemental decree; and that the increase in intensity of use allowed in the supplemental decree does not conform to the mandate of the Appellate Court.

The plaintiffs urge that their rights were crystallized by the original decree, and that the City had no right to "rezone" the property by its ordinance of April 10, 1967; that the suitability of plaintiffs' property for single-family use is irrelevant; and that the supplemental decree is in accordance with the mandate of this court and should be affirmed.

The differences in the contentions of the parties arise because they reason from fundamentally different premises. The City has manifested a complete disregard for the opinion and mandate of this court except in the one area where it may benefit therefrom—the matter of the increase in intensity of use allowed in the supplemental decree. Otherwise, it has proceeded in a cavalier manner, oblivious to the language, intent and meaning of the opinion and mandate.

We see no valid separation of powers problem in the entry of the supplemental decree. Under Article 6, section 9 of the Illinois Constitution, the Circuit Court has original jurisdiction of all justiciable matters. The jurisdiction of a court over the subject matter and parties in a case, once fully attached, as in the case at bar, continues until all issues of fact and law have been finally determined. In general, the jurisdiction ceases on the rendition of a final judgment or decree, except for such purposes as the enforcement or correction of the judgment or decree. *Kovac* v. *Kovac,* 26 Ill. App. 2d 29, 47, 48 (1960).

In *Tindall* v. *Keeker,* 1 Scam, (2 Ill.) 137 (1834), at page 139, the court stated:

> "The rule * * * is, if an inferior court has jurisdiction ab origine, no subsequent fact arising in the case, can defeat it, when it was lawful in the inception."

Likewise, in *Irmegar* v. *County of Tazewell,* 264 Ill. 172 (1914), at page 174, the court stated:

> *"The general rule is, that the jurisdiction of a court over a cause depends on the state of facts at the time the action is brought; that after jurisdiction has once vested it cannot be divested by subsequent events. Change of residence or of the condition of the parties or of the amount in dispute cannot take away jurisdiction that has once attached.* (Tindall v. Meeker, 1 Scam. 137; Alley v. McCabe, 147 Ill.

410; Mullen v. Torrance, 22 U.S. 536; Clarke v. Mathewson, 37 id. 163; United States v. Dawson, 56 id. 467; State of Wilkins, 67 N.H. 164; Hawes on Jurisdiction of Courts, sec. 23.)" (Emphasis Ours.)

Also see: *In re 431 Oakdale Avenue Bldg. Corporation,* 28 F. Supp. 63.

The trial court acquired jurisdiction of the parties and of the subject matter in the case at bar under the state of facts existing when the action was brought. However, before the matter came on for trial the City had rezoned the plaintiffs' land to O & R. The jurisdiction which the court had acquired continued, and at the trial the validity of the O & R zoning was challenged, and determined adversely to the City. (76 Ill. App. 2d 62, 74, 75.) Also see: *Ridgewood Air Club* v. *Board of Adjustment,* (N.J. Sup) 55 A. 2d 100, 101, 102 (1947).

The City was aware of the import of the decision and mandate of this court as is reflected in the report of its Plan Commission dated February 2, 1967, which stated, in part, as follows:

"In June, 1964, before the Commission had concluded its hearings, the original petitioner instituted legal proceedings which he amended after the Council acted in September, attacking the G-1 zoning with respect to a part of his parcel as arbitrary and unreasonable and requesting mulitiple family use for that portion. After trial, the Circuit Court of Lake County granted the requested relief.

"The Appellate Court affirmed the part of the decree voiding the G-1 classification, but reversed that part which held single-family zoning void and which ordered the City to permit use under the F classification. The Appellate Court remanded the cause to the trial court with directions to reframe its decree relating to the permissive use of the land with reference to the evidence of the contemplated use for multiple family, and directed the taking of further evidence, if necessary. The apparent purport of the

Appellate Court decision was to allow the use of the premises for multiple-family purposes provided the decree was framed in terms of particular use and not in terms of the F classification. The City has petitioned the Illinois Supreme Court for Leave to Appeal, contending, inter alia, the (sic) the lower courts erroneously voided the G-1 zoning and that in any event the effect of such voiding would be to reinstate the prior B-1 single-family zoning."

In the light of the language, intent and meaning of the opinion and mandate, and the understanding of it, as indicated in the report of the Plan Commission, the act of the City in rezoning plaintiff's property to the same single-family classification which it had in 1963, indicated a complete disregard for, and constituted an attempt to thwart, the opinion and mandate of this court. We have utmost respect and deep regard for the philosophy embodied in the principle of the separation of the powers of the three branches of our government. However, a City which is an appellant in zoning litigation, cannot parlay the doctrine of separation of powers into an authorization to exercise its delegated legislative powers after the case is decided adversely to it and remanded to the trial court with directions, and thereby frustrate and void the opinion and mandate of the reviewing court to which it submitted its case for decision.

The question on the original review of the case at bar was the constitutionality of the zoning ordinance as applied to the plaintiffs' property. The construction, application or constitutionality of an ordinance rests with the courts, and not with the legislative branch of the City, which is the creature of the General Assembly.

We completely recognize that the General Assembly has delegated to the City the power to enact a zoning ordinance. However, it is also beyond dispute that the courts have the jurisdiction to determine the application and constitutionality of such ordinance with reference to the plaintiffs' property. *City of Aurora* v. *Burns,*

319 Ill. 84 (1925). Jurisdiction is the power of the court to make a wrong, as well as a right decision. *Pope* v. *United States,* 323 U.S. 1, 14 (1944).

In general, the legislative department of the government is prohibited from encroaching on, or unduly burdening the judicial department in the exercise of its functions. *Agran* v. *Checker Taxi Co.,* 412 Ill. 145, 148-150 incl. (1952); The *People* v. *Scott,* 383 Ill. 122, 126 (1943). Specifically, the legislature may not, by legislation passed after causes of action have been adjudicated by a reviewing court, control or effect the result of the litigation. *The People* v. *Owen,* 286 Ill. 638, 641, 642 (1919); *The People* v. *N.Y. Central R.R. Co.,* 283 Ill. 334, 335 (1918); *C & E. I. R. R. Co.* v. *The People,* 219 Ill. 408, 410, 411 (1906).

When we, as a reviewing court, affirmed the judgment in part and reversed it in part and remanded the cause to the trial court with directions, our opinion and mandate was binding on the parties litigant who had submitted the matters to us for decision. It did not enhance the stature of the City, its officers or counsel, because of their disappointment in the outcome of the litigation, in our Court and the Supreme Court, to seek to overrule the force and effect of the opinion and mandate of this court by further legislative action after the cause had been adjudicated by us, and our opinion finalized by the Supreme Court by its denial of the City's petition for Leave to Appeal

Likewise, the trial court was bound by the decision and mandate of this court. In *Berry* v. *Lewis,* 27 Ill. 2d 61 (1963), at pages 62 and 63, the court stated:

> "After a judgment is reversed and the cause is remanded the inferior court can take only such further proceedings as conform to the judgment of the reviewing court. (People ex. rel. Bauer v. Henry, 10 Ill. 2d 324; Ptaszek v. Konczal 10 Ill. 2d 326.) When the court of appellate jurisdiction, in considering a case, determines the issues and decides

the questions involved on their merits, reversing the judgment and remanding the cause with directions to proceed in conformity with the views expressed in the opinion, there is no power in the court below except to enter a final order or judgment without retrial. Nye v. Nye, 411 Ill. 408; In re Estate of Naher, 210 Ill. 160."

Thus, the trial court had no choice upon remand, other than to enter a supplemental decree in accordance with the mandate of this court. A fair consideration of *Sinclair Pipe Line* v. *Richton Park,* 19 Ill. 2d 370 (1960); *Franklin* v. *Vil. of Franklin Park,* 19 Ill. 2d 381 (1960); *Fiore* v. *City of Highland Park,* 76 Ill. App. 2d 62 (1966); and *Harshman* v. *City of DeKalb,* 64 Ill. App. 2d 347 (1965), cannot but lead us to the conclusion that the City, deliberately or otherwise, misconstrued the meaning of the word "unzoned" as used herein. By construing the word out of the context with the substance of those opinions, the City sought to justify its unwarranted act of rezoning the plaintiffs' property after its appeal had been adjudicated by the reviewing courts. In the light of the cases cited and the principles set forth, the adoption of the ordinance of April 10, 1967 was unwarranted, and it was necessary that the trial court declare it invalid in the supplemental decree, as an act beyond power of the City. To hold otherwise, under the circumstances of this case, would relegate the decisions of reviewing courts to the status of an exercise of futility.

In *Franklin* v. *Vil. of Franklin Park,* supra, 385, the court, in delineating why the trial court should frame its decree so as to permit a particular use when it finds the existing zoning invalid, stated:

> "If the ordinance was declared unconstitutional and the land left unzoned, the plaintiff would be free to use his land for heavy industrial uses not contemplated at the trial, or the village might rezone to another classification that would still exclude most commercial and industrial uses. In either case the

true holding of the court would be flaunted. The court may frame its judgment to effectuate its findings as to the rights of the parties."

Our opinion, and the City's understanding of it—as reflected in the Plan Commission report—has heretofore been set forth. A reasonable construction of our opinion could not possibly lead the City to the conclusion that it was free to force the plaintiffs into "further litigation due to further rezoning by the municipality" after adjudication by Illinois reviewing courts. Such conclusion would put the hallmark of approval on one of the evils which the decisions in Village of Richton Park, Village of Franklin Park, City of Highland Park and City of DeKalb pointed out and sought to avoid.

We heretofore adjudicated the issues of the applicability of the single-family zoning classification as it existed prior to the O & R zoning. We held that the City, prior to the decision in the trial court, removed the single-family classification from consideration by its determination that it was in the interest of the general welfare that this land be zoned O & R. The pleadings at the trial challenged the O & R zoning and such issue was before the trial court. Thus, at this stage of these proceedings, the suitability of the plaintiffs' property for single-family use is not in issue and is irrelevant.

The only matter before the trial court on remand was the framing of "its decree pertaining to the permissive use of the land in question with reference to the plaintiffs' contemplated uses * * *." If necessary, it could hear further evidence in this regard.

The City may properly raise in this review the propriety of the trial court's action in increasing the intensity of use as allowed in the supplemental decree. We regard the change in construction plans as reflected in the supplemental decree as reasonable. The changes with reference to underground parking, a decrease in the number of buildings, and the increase in the number of units

from 144 to 168, will result in more open space on the land involved and a greater intensity of its use. We do not regard this as any change in the concept of the devolopment of the property.

Time has passed due to this litigation, the needs of the area have changed with the delay, and construction costs have increased, as have the prices of equipment and furnishings. Also, under the "F multiple-family" use classification, approximately 288 units would be permitted on the land in question. In view of all the testimony on the question of intensity of use, as well as on the total issue of the permissive use to be made of the land in question, we cannot say that the use specified in the supplemental decree is against the manifest weight of the evidence.

It is our duty to review the evidence, and to reverse the verdicts of juries or the judgments of courts whenever we find such verdicts or judgments clearly against the manifest weight of the evidence. *Elgin Lumber & Supply Co.* v. *Malenius*, 232 N.E. 2d 319, 323 (1967); *Revcor, Inc.* v. *Fame, Inc.* 85 Ill. App. 2d 350, 356 (1967). Such circumstance is not present in the case at bar.

Accordingly, the supplemental decree of the trial court is affirmed.

Decree affirmed.

ABRAHAMSON, *P.J.*, and MORAN, *J.*, concur.

APPENDIX H

Petition for Rehearing Denied

Howard K. Kellett
Clerk

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT
Elgin, Illniois 60120

April 4, 1968

General No. 67-130

The Court Has This Day Entered The Following Order In The Case Of:

Vito Fiore, et al, appellees v. City of Highland Park, etc.

Petition for Rehearing denied.

Howard K. Kellett,
Clerk

Thomas H. Compere
Corporation Counsel
City Hall
Highland Park 60035

Berle L. Schwartz
Asst. Corporation Counsel
1707 St. Johns Av.
Highland Park

John F. Grady
9 N. County St.,
Waukegan

APPENDIX I

Petition for Leave to Appeal Denied

State of Illinois

Office Of
CLERK OF THE SUPREME COURT
Springfield

September 23, 1968

Clell L. Woods
Clerk

Mr. Thomas H. Compere
Corporation Counsel
Highland Park, Illinois

Dear Mr. Compere:

In Supreme Court today, in Case No. 41397 entitled:

Vito Fiore, et al., etc.,
respondents

vs.

City of Highland Park, a municipal
corporation, etc., petitioner

Petition for Leave to Appeal was: Denied

Very truly yours,
Clell L. Woods
Clerk of the Supreme Court